

How to Predict the Differences in Uniformity between Different Areas of a Future European Private Law? An Evolutionary Approach.

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2. How to predict the differences in uniformity between different areas of a future European private law? An evolutionary approach

Jan M. Smits

2.1 INTRODUCTION

In this chapter, it is investigated whether it is possible to predict the evolution of (parts of) national European private law systems toward a uniform private law. In doing so, insights of evolutionary theory, economic analysis of law and (socio)biology are taken into account in what is essentially an interdisciplinary approach toward the evolution of European private law. One of the characteristics of the now rapidly emerging discipline of European private law is after all that it is still so much in its infancy that it is very fertile to try to profit from neighbouring disciplines in establishing the foundations of this discipline.¹ Whether it is possible to predict the measure of uniformity in European private law is, of course, of great scholarly and practical interest. From a scholarly point of view, it may give us insight into the differences in types of legal rules and types of private law areas with regard to their resistancy to harmonization. From a practical viewpoint, insight into the measure of uniformity to be attained tells us what public policy should be regarding decisions on the introduction of European Directives on specific fields of private law. Drafters of European ‘Principles’,² and other projects aiming at being a ‘soft law’ precursor to some European Civil Code,³ may also benefit from these insights.

This chapter presupposes a specific theoretical framework that is made explicit in Section 2.2. In Section 2.3, the insights comparative law studies have provided us with regarding the possibility of legal unification, are surveyed. From there, the perspective changes to some other disciplines and their experience in the domain of evolution of norms and to what has been attained in Law and Economics scholarship (Section 2.4). After that, we are allowed to make some explanatory predictions on the future of European private law and its penetration into the different areas private law consists of (Family law, Contract law, Tort law, Property law and so on).

2.2 THEORETICAL FRAMEWORK ON THE POSSIBILITY OF UNIFORMITY IN EUROPEAN PRIVATE LAW

The theoretical framework this paper presupposes⁴ is that uniformity of law in most of the cases cannot be created by just imposing rules through public policy. Private law is – at least partly that is – more than rules and may in this respect and in some cases be considered as (legal) *culture*;⁵ in those cases, public policy consequently cannot have a severe influence on private law. Would this be different, there would be no need to assess any organic evolution of legal norms, other than the evolution of legislation itself;⁶ law would then be nothing but a positivist artefact of some sovereign. Moreover, it would not be a question anymore whether it is possible to predict uniformity because uniformity would then follow automatically from the famous ‘berichtigende Worte des Gesetzgebers’ (von Kirchmann, 1848). Two different claims are immanent in this presupposition.

The first one is that the mere drafting and enacting of Principles of European Private Law or the mere searching for a common core⁷ does not in itself lead to uniformity. Private law is to a certain extent harmonization-resistant, even when confronted with centrally imposed rules. To which extent this is the case (is it true for all areas of private law and for all types of legal rules?), is a question this chapter intends to illuminate. However, the contention of Pierre Legrand (1996, pp. 61–2) that ‘legal systems . . . have not been converging, are not converging and will not be converging’ appears to be too radical. His idea of law as entirely embedded in the society and culture of a specific country has not been recognized as insightful.⁸ Moreover, Legrand’s idea of comparative law would by many comparative lawyers not be identified as falling within the limits of that discipline at all. F.H. Lawson, for example, once stated that comparative law in itself ‘is bound to be superficial’ and linking law to other societal and cultural phenomena of a specific country would be impossible (Lawson, 1949, p. 16).

The second claim I implicitly make is that a greater extent of legal uniformity than exists right now *is* possible, but should to a large extent come about in an *organic* way. This opens up a whole variety of research themes, related to other disciplines than the law and aiming at the study of cases where organic, spontaneous, orders have originated through evolution and not by creation. More specifically, I previously defended that the best way of unification of law in Europe would be through the competition of legal rules (smits, 1997, p. 328). In transplanting legal rules from one country to another on a ‘market of legal culture’ (compare Mattei, 1994, p. 3), the best European legal rule may survive. this does not automatically imply that *any* rule glorifies: in some instances, diversity of law may be just as good as uniformity as long as

there is this free movement of legal rules, at least creating the *possibility* of legal change. Some of the questions this theory poses (When will uniformity prevail? Which rule is the best to survive? Is that rule the result of a 'race to the bottom' or not? Are there differences in the extent that various areas of a discipline are touched by the evolutionary process?) may be provided with a preliminary answer in this chapter, partly building upon other disciplines. Taking Alan Watson's famous saying that 'most changes in most systems are the result of borrowing' as a starting point (Watson, 1974, p. 95), it is important to see which conditions favour or hamper the legal development through transplants.

2.3 TRADITIONAL POINTS OF VIEW ON LEGAL CHANGE

It is surprising to see how little *comparative law* study has been made of the process of legal change in private law. Anyone interested in the process of unification of law in Europe should, however, be aware of the historical evidence that is present within legal systems and that shows us how a legal system copes with changes in society as a whole and which rules are better prepared for those changes than others. The explanation for this lack of interest is undoubtedly caused by the positivistic stance that private law studies have taken in Europe ever since the enactment of national Civil Codes (which may also explain why the evolutionary tradition is much stronger in Anglo-American jurisprudence, where codes are mostly lacking). Since then, private law is merely looked at as a design *choice* of a creator, not as an organism shaped by its environmental conditions. Now that the tendency in Europe is moving away from national private law systems and toward harmonization, it is no more than logic that evolutionary ideas are becoming more important again in law.

The evolutionary tradition in law that does exist is mainly related to authors opposing codification (like von Savigny) or authors from the Anglo-American tradition. It is, however, sad to see that the most prolific application in law of evolution theory on the European continent still is the work of von Savigny and his Historical School, propagating an organically progressive jurisprudence', law being part of the *Volksgeist* (von Savigny, [1814] 1967). Savigny's view is, however, much too vague to be regarded as a true scientific theory of legal change.⁹ Maine does offer such a theory,¹⁰ although he looks at the evolution of the legal system as a whole and not so much to the evolution of legal rules *within* that system. Several other authors – influenced by the publication of Darwin's *On the Origin of Species* in 1859 or not – have offered theories on the evolution of legal institutions,¹¹ without, however, taking advantage of the insights of other disciplines.¹²

The most prolific comparatist, emphasizing the need for study of 'the nature of legal development' is undoubtedly Alan Watson.¹³ He stresses the historical dimension by looking at the evidence that the historical study of law provides us with. Evolutionary theory – or any theory whatsoever – he however denies as being too general for his purpose.¹⁴ 'There is no equivalent of the 'invisible hand' of economics that under perfect conditions would keep a balance between supply and demand' (Watson, 1974, p. 108). Yet, one need not go so far as to contend that a theory of general legal development should be applicable to *all* societies for *all* time and then reject such a theory as being too theoretical to explain the evidence that is present; I regard it possible to develop some general theory for Europe. That theory should go beyond the commonplace that it is much more difficult to come to harmonization in property law (compare Gambaro, 1997, p. 497) or family law (compare Steenhoff, 1999, p. 1) than it is in the law of contract or in the law of torts. When Koopmans (1997, p. 543) states that:

There is . . . agreement that we should not include family law and the law of succession. In these areas, patterns of social behaviour tend to resist to the introduction of new rules. Besides, religion plays a certain role, and moral choices must be made, which are not necessarily the same in the whole of Western Europe.

he uses a rather rough argument. Counterarguments are of the same generality (compare Rieg, 1990, p. 58; Mátiny, 1995, p. 419). Moreover, the evidence Watson provides us with on legal transplants that have taken place in the past (also in the field of family law) seems to contradict this general idea.¹⁵ Neither are the traditional comparative law efforts to explain *why* legal transplants take place of a very precise nature. It is mostly just the 'prestige' of a specific legal rule that is mentioned (compare Mattei, 1997, p. 124). One should have a look at the disciplinary analysis of the process of change to reach better results. In the following, a sketch is given of some evolutionary disciplines with a view to the process of legal change. I will emphasize what to my idea is important for a better prediction of where uniformity will prevail.

2.4 EVOLUTIONARY BIOLOGY, ECONOMICS AND LAW AND ECONOMICS

The most well known application of evolutionary theory is, of course, to be found in biology.¹⁶ According to classical Darwinism, evolutionary changes takes place through natural selection. The individual members of a species organize their lives to produce the most surviving offspring and in doing so, they necessarily adapt themselves to changing circumstances (Rodgers, 1998, p. 451). The descent of one or more trees of life thus leads to a diversity of

species through speciation, extinction and the evolving of new characteristics within these species. In Darwinism, this process of evolution by natural selection presupposes three ideas (Sober, 1993, p. 9). First, there must be variation in the species (otherwise there would be no species that could better survive than others); second, the variation must concern variation in fitness (understood as the ability to survive and reproduce, some species being more able to adapt themselves to changing circumstances than others), third the characteristics that are constituent for the fitness of the species must be inherited (otherwise, there could be no evolution of the species as such). Only with these three constituents, can a 'struggle for life' originate.

As to the evolution of legal rules in Europe, it is possible to 'transplant' the first two of these requirements: in European private law too, different rules exist as to the solving of identical cases and presumably not all of these rules are as 'fit' as others to carry out their task. Much of the present day rules in the various European countries are the result of a long evolution, adapting them to the environment these rules had to operate in. According to evolutionary theory, other rules that once existed in these countries must have been eliminated in this process of natural selection and any change of the environment in the future would – again – lead to adaptation of the present rules. The third requirement of Darwinism (the inheritability of characteristics) is more problematic in the context of law because of the simple fact that descendants that take over the genes of the previous species do not exist. As we shall see, however, other disciplines that make use of evolutionary analysis (in particular economics) solve this problem by identifying analogues of genes.

Apart from these constituents of evolution, theoretical biology distinguishes between the different possible causes of evolution. In this respect, natural selection is only one of them, alongside with mutation, migration, recombination and mating (Sober, 1993, p. 18). What is important for the purpose of this chapter is the discussion about what *actually* causes evolution ('Why do polar bears have white fur and other bears brown fur?'). This discussion on what is called *adaptationism* is about the importance of natural selection in the process of evolution. What is actually the power of natural selection? (See Sober, 1993, p. 119.) The question is important for the evolution of law because it may give us insight into the question why it is that some legal rules survive and others do not. Biology teaches us that as to the direction of the evolution, *adaptation* is the main principle. Organisms fit themselves 'into niches of viability offered by their environments'. They have to, in order to survive the pressure of elective competition from other organisms. What may be of interest for the study of law is that the direction of adaptation is usually toward simplicity, in particular when homogenization of the environment reduces the number of distinct niches available. The movement is toward complexity when there are only a few species that proliferate within a new

environment with many unfilled niches (Hirshleifer, 1993). I will come back to this point later on.

Theoretical biologist Sober provides us with a good insight into another discussion (Sober, 1993, p. 119). To predict what the mechanism of evolution leads to, it is possible to make use of simple models of the selection process – for example in the case of the evolution of running speed in zebras, fast zebras may survive over slow zebras – taking into account only natural selection and not mutation nor other evolutionary processes and abstaining from the fact that running speed may not evolve independently of other characteristics the zebra has. Adaptationists would say that any refinement of the simple model does not affect the prediction of how the running speed would evolve. If this were also true for the law, it would mean that selection of legal rules is a straightforward process, not hampered by other factors than the pursuit of finding the best rule available. As we shall see, this is not the case in the real world.

As Darwin intended a theory on how life evolves, other theorists have expanded his theory to other disciplines. Among these are chemistry, history (Shaw and Pomper, 1999), sociology, psychology (Plotkin, 1997), political sciences (Hayek, 1973–1979), history of science (Popper, 1979), sociology,¹⁷ ethics,¹⁸ economics and linguistics.¹⁹ In this section, I will focus on evolutionary economics.²⁰ In this application of evolutionary theory too, the idea of an unalterable human nature or of a conscious design is abandoned for the idea that ‘selection by the environment’ (Elliott, 1985, p. 60) should be the starting point for any analysis of a social or economic order. It is a programmatic contention that some patterns have survived because they were able to be adapted to environmental circumstances (see Vromen, 1997, p. 45). There is, however, dispute as to the existence of real evidence for this idea. In neoclassical economics, this evidence is, for example, provided in the sense that only those firms that maximize profit survive the process of market selection. Neoclassical analysis – excluding uncertainty anyway (see Hodgson, 1999, p. 40) – assumes this is the case because of deliberate choices made by these firms,²¹ and usually adds to this that in evolutionary theory the natural selection process mimics rational decision making.²² ‘Market selection will produce rational market behaviour even if firms display irrational behaviour.’²³

Would this be true for the law as well, it would be an important point for legal analysis of European private law. The rough transplantation of this idea to law would mean that even if the legislature decides to enact legislation by deliberate choice, subsequent selection of rules on the market of legal culture would produce the same results. It is, however, very much disputed if neoclassical analysis is right at this point. Evolutionary theory makes clear what is the significance of ‘path dependence’ in evolutionary processes, Roe (1996, p. 643) has applied this idea to law.

The future time path the evolution is bound to take depends on the 'adaptive landscape' in which various factors such as environment conditions (like natural constraints) are at work. What should be the case to have a true spontaneous order evolve is to have the external environmental conditions prevail. Often, however, there are also internal materials (in organisms these would be the genes) that have been shaped by transformations in the past that are now irreversible. These were once responsive to the environment of those days, but are now constraints upon adaptive change (Hirshleifer, 1993, p. 205). The future development is thus affected by the path it has traced out in the past. In economic terms, it would mean that an equilibrium will not originate, and this – as Hodgson puts it – is in contrast with the view that 'real time and history could be safely ignored' (Hodgson, 1993, p. 204). In biology, especially, Gould (1989) has pointed out that evolution often depends on 'accidents', leading to an eccentric path, like in an economy where the most efficient organizations may not come out on top because, for example, of the fact that early factories to a large extent originated in times of war (in the time of Napoleon in Britain, in the time of the civil war in the US), thus promoting a militaristic and hierarchical organization (Hodgson, 1999, p. 204). The lesson to be learnt from this for the law is that evolution of legal norms may not under all circumstances lead to the best result. The task that lies ahead is to find out where this strong path dependency has had a formative influence on the law of the various European countries.

Another insight evolutionary economics provides us with is that as to the third requirement of natural selection (the inheritability of characteristics), some analogy to genes is possible. Notably Nelson and Winter use *routines* as playing the same role in firms as genes do in organisms (Vromen, 1997, p. 52). The routines of a firm establish a *stable identity* of the firm that endures over time *and* – just like genes – they *programme* the behaviour of the firms. As long as the routine is profitable, firms stick to these. Here, again, it goes without saying that firms are usually not able to change these routines too fast. Vromen points out that this is consistent with evolutionary game theory, which says that agents have fixed, unalterable behavioural strategies (rules of conduct restrain the behaviour of agents), but inconsistent with neoclassical economics which says that economic agents are able to respond in an optimal way to changes of circumstances (Vromen, 1997, p. 53).

Some of the insights of the previously mentioned disciplines have been incorporated into standard Law and Economics scholarship. Of course, the standard hypothesis there is that since people have a desire to eliminate costs, the law evolves toward legal rules that minimize social costs and thus increase economic efficiency (Rubin, 1977, p. 51; Priest, 1977, p. 65). This thesis on the evolution of legal norms then follows from the more general assertion that the whole of the common law is efficient (Posner, 1998). Rubin and Priest

have point out²⁴ that since inefficient rules are more likely to be disputed in court, these rules change in the re-examination by the court, while other rules survive. Cooter and Kornhauser (1980, p. 139) have added to this that evolution does not necessarily lead to only one surviving efficient rule, but to some equilibrium of best and worst legal rules, constantly competing for survival. This would be in accordance with modern biology, in which it is recognized that nature may have very different solutions for one and the same problem (Elliott, 1985, p. 70). The problem of path dependency, however, does not play an important role in present Law and Economics scholarship. Roe²⁵ may be right that this is due to the important role that policy plays in this discipline: evolutionary ideas do not direct us toward some policy direction.

In the following section, I will try to make use of these – admittedly eclectic – insights in trying to establish the factors that are decisive for the development of uniform private law in Europe.

2.5 PREDICTING DIFFERENCES BETWEEN AREAS OF PRIVATE LAW

2.5.1 General Observations

What is the relevance of the above for the venture of European Private Law? The way I see it, uniform law in Europe primarily comes about through an evolution of legal norms. If this is an apt qualification of the unification process, it is subject to the more general mechanisms and principles of evolution as just described. At first, some general observations that stem from the previous survey seem to be appropriate for the purpose of this chapter. Then, I will elaborate some points in more detail.

First, the question should be put to what extent the Darwinist requirements for a survival of the fittest are applicable in European private law. In an evolutionary theory of European unification, the various national rules to solve similar problems may be regarded as the necessary variety of species. This variety has come about through differentiation that started from one ‘tree of law’ (most probably some general concept of ‘fairness’ from which the various rules originated). The second requirement as to the variation in fitness is met as well as long as it is presumed that not all the legal rules are as ‘fit’ as others to carry out their task. Some rules may have been eliminated by the environment in which they had to operate; others may have survived because of their ability to adjust themselves to changing circumstances. The third requirement (inheritability of characteristics) can be met if legal institutions may differ as the identity of the institution as such remains the same (as in economics routines establish a stable identity of a firm). Just like new

routines of firms are seldom entirely new, but most of the time combinations of old ones that guarantee that the specific identities of these firms are maintained (Vromen, 1997, p. 53), the institutions that programme the behaviour of the rules in response to the changing environment maintain their specific identities as well. This idea calls for an application in the field of private law (Section 2.5.2).

Secondly, evolutionary theory enlightens us as to the possibility of the best rule surviving in the 'struggle for life'. This is definitely not a straightforward mechanism. To predict which rules survive and which do not, one cannot just take efficiency or any other mono-explaining mechanism (the 'simple model') as a key concept. Two different sorts of barriers to the emergence of the best legal rule should be taken into account. First, historically, the rule that has emerged may have been best adapted to the environment in which it had to function in the past. The consequence of this is that some rules may have been responsive to that past environment, at the same time eliminating rules that were not adaptive in those days, but may have been the best rule for present times had it not been for their elimination. Selection on the market of legal rules in this sense does not produce the best available rules. Second, there is a future oriented aspect of this approach as well. Even if one is able to 'reinvent' the rule that disappeared (and legal history can play an important role in doing so), it may be too costly to have that other rule prevail over the one we have become accustomed to. This so-called *path dependency* (the future development is affected by the path it has set out in the past) prevents an equilibrium to evolve. 'Accidents' may thus be just as important to explain the past and the future development of law. I will elaborate this idea with a view to the harmonization process in different areas of private law (Section 2.5.3).

Thirdly, it is fruitful to look at legal rules as having a desire to reproduce themselves. This analysis may explain why it is that the *same* legal rules over time are often used for different goals. 'Funktionswandel' of a rule may indeed happen more frequently than the clear-cut elimination of a rule. As we saw that organisms fit themselves into 'niches of viability offered by their environments', legal rules want to survive as well in a changing society. It, then, is only because of the use of the same terminology or the embedment within the same institution that a stable identity remains (this point is related to the one discussed in Section 2.5.2). Legal transplants may – at least partly – also be explained by this mechanism (Section 2.5.4). Moreover, it is interesting to find out to what extent the adaptation process in legal rules follows the same principle as in biology. If the direction of adaptation were indeed toward simplicity in case of homogenization of the environment, it would be an indication of the direction private law would take in a unified Europe (that is, the environment of a highly uniform economy). This biological idea is – as I see it – very much related to the famous *race to the bottom* argument. Unlike the present

debate about that argument – that is merely on a *normative* level – evolutionary theory is able to show us that this process may be *inevitable* in a changing economic environment (Section 2.5.5). This argument may even be somewhat generalized with a view to the discussion on mentality as preventing a uniform European private law from coming about.

2.5.2 About the Way Private Law Rules Adapt to Changing Circumstances

For the enterprise of creating a uniform law in Europe, it is interesting to see what *form* this law is bound to take. Evolutionary theory predicts that the external identity of institutions may very well stay the same while their contents may differ. This result is consistent with what legal history shows us: concepts like contract, tort, property and marriage may *in name* remain identical, their content on the level of rules differs to a great extent in the various periods of time. This combination of an ‘inherited’ element and an element of variation guarantees that the adaptation of a rule to a new environment takes place in a not so overt way. To be more precise: a true *elimination* of one rule for another is not as likely as the *adaptation* of existing rules. Moreover, this adaptation or *mutation* of rules is not likely to happen in a stable evolutionary way. In biological evolution, the genes of a species are stable until there is a crisis (like an asteroid hitting the earth). It is only then that the species begins to mutate rather quickly and then either dies or adapts itself to the changed circumstances (Roe, 1996, p. 663). The species then may be extremely well adapted for the period of crisis (having the characteristics to survive that crisis), but not for the period thereafter.

This theory can be substantiated with the following. The environment in which most of the present legal rules in Europe have survived has been an environment of a *national* legal system that was most of the time embedded within a *mixed market economy*. Most of the private law rules in continental Europe were able to survive because of their ability to adapt themselves to these characteristics. It is thus not much of a surprise that the surviving rules are the exponents of a liberal and individualist model: in particular, they were extremely well adapted for the ‘crisis’ of the French Revolution; these rules have subsequently been laid down in national civil codes. Freedom of contract, the liability for damages in case of fault and the absoluteness of property – including the rules originating from these concepts – thus have survived. To say that these concepts are well adapted for the present-day environment is, however, hard to maintain. The many amendments that have been made to the rules emanating from these – indeed still under the same institutional heading – but in particular the important that is attached to open-ended norms (good faith, reasonableness, negligence) in my view indicates that the present rules

are now much less *normative* (and thus prescribing their future application) than they were at the time of the crisis they have survived.

A good example of this phenomenon is the elimination of mechanisms to decide which promises are binding and which are not. *Causa* and *laesio enormis* served this particular purpose in the law of contract of the continental European private law systems before the great codifications (on this see Gordley, 1991). They were eliminated in the codification process or in the time period immediately after the codification because they were useless in a system that put so much emphasis on the absolute bindingness of contracts. It would, however, have been fruitful to have these concepts available in a later period of time, when contract law had to find a mechanism for deciding which contracts had to be binding upon the parties and which not. But in most European legal systems, courts were not able to refer to that concept anymore: they now had to use other legal concepts (good faith, the reliance principle in contract law and so on; see Smits, 1997, p. 280) to reach the same result. It was only in the common law that the requirement of ‘consideration’ still could play the role of distinguishing between promises that were enforceable and those that were not.

The coming into being of a common European market may very well be a new evolutionary ‘crisis’. It is highly likely that – again – legal institutions will get a different content while keeping their identity in a process of adaptation. The new environment that is now emerging at high pace is the *European* environment of a *common* market, in contrast to the *national* environment of a *national* market that most of the rules have adapted themselves to. Joerges (1995, p. 179) rightly points out that market integration leads to a rationalization process in which all national law that constitutes an obstacle to the functioning of the internal market is under a pressure to change. This calls for a survey of which areas of private law will be most affected by this process.

2.5.3 Path Dependence and Areas of European Private Law

It is usually held that the process of emergence of a common market only calls for the unification of those parts of the law that are vital to that market, namely contract law and parts of the law of property (in particular the security interests) (see Gambaro, 1997, p. 497; Bonomi, 1998, p. 497; Zwilve, 1995, p. 391). From the evolutionary perspective that is chosen in this chapter we should, however, not be concerned with which parts are from a normative perspective *to be* unified, but – more descriptively – which parts are *most likely* to be affected by the changing environment.²⁶

To decide to what extent uniformity of private law can come about in Europe, it is at first useful to follow roe (1996, p. 646) in his concept of – what he calls – *weak-form path dependence*. This form of path dependence only *explains* what

has survived; it does not entail that the survivor is better than another: 'a society chose between two institutions and the choice became embedded, but the chosen institution functions as well as the one discarded would have (*ibid.*, p. 647). A road may be built at the left bank of the river or at the right bank of the river, but the left bank is not any 'better' than the right bank.

In case of this weak-form path dependence, there are no obstacles for harmonization. The types of rules one would think of as touched by this form of path dependence are those related to the more technical aspects of the law. Whether prescription periods or other time-related devices in the law are two years, five years or ten years is usually arbitrary. On the other hand, an evolution towards some 'best' rule is not really feasible here either. Courts usually are not willing to reconsider these types of legal norms. Harmonization would therefore only be possible through the imposition of a rule by some sovereign (European) authority. In other words: the framework as described in Section 2.2 (uniformity as far as legal culture allows) is not inconsistent with a centralistic imposing of law upon the various European countries.

It is not so easy to identify the type of rules just described from other types of rules. Watson (1974, p. 96) seems to see a much more important place for these 'arbitrary rules':

The truth of the matter seems to be that many legal rules make little impact on individuals, and that very often it is important that there be a rule; but what rule actually is adopted is of restricted significance for general human happiness.

As far as the substantive parts of contract law, tort law and the law of property are concerned, I would rather not qualify these as examples of weak-form path dependence. The idea that it is indifferent which rule to adopt and that any evolution toward rules better suited for some environment than others is impossible, is not in line with the idea of these disciplines evolving to more efficient rules to the extent that this is possible.

This is not to say that path dependency does *not* play a role in the traditional private law disciplines. On the contrary: other forms than weak path dependency²⁷ are certainly present. If we assume that the Europeanization of private law presents a 'crisis' in the evolutionary sense, the path already taken may thus prevent the best possible rules for the new European environment from evolving. That evolution leads to a great amount of uniformity is least probable where it is only possible to change the present rules at the expense of high costs. The least uniformity is likely to be the case with rules that many people rely upon; on the other hand, the amount of uniformity to be attained should theoretically be the most in the case of rules that are only of use for the parties that set these rules themselves. Gambaro, for example, states the following about the law of real property:

When one considers the nature of various property rights (obligations between neighbours, riparian rights, condominium law, rights of superficies, servitudes, and the like), it becomes rather clear that much property law is deeply rooted in locally developed legal traditions. And, for this reason it is better left to those local legal traditions which for hundreds of years have addressed these issues in the manner most adapted to the locality. (Gambaro, 1997, p. 497)

Gambaro is certainly right, but the reason why these rules are looked at as most adapted to the locality has, in my view, much more to do with the investments that have already been made in the path of property law, and from which it is too costly to deviate, than with 'the nature' of property rights. To change the national law in the areas mentioned by Gambaro would mean that third parties' interests would have to be reconsidered on a very large scale. The reliance of the parties involved on the existence of 'absolute' rights that have effect *erga omnes* would be violated if the applicable rules on, *for example*, the establishment of limited rights and the registration of these would be eliminated or even changed. The taking into account of so many different interests has led to delicate static systems of property law with – most of the time – a *numerous clausus* of limited real rights (see Smits, 1999, p. 246). Moreover, to get to know the ins and outs of property law in a specific system is far more difficult than to get to know a country's law of contract: the information costs of the former are much higher.²⁸ In this sense, property law is 'stuck in a local equilibrium'. In the bigger part of property law, this does not pose a true problem: any need to have uniform law is virtually absent. It is a problem, however, where there *is* a need, namely in the field of security interests: here, the *desire* and the *present practice* as it has evolved in the past (adapted to national systems of law) are the most divergent. Accordingly, it is the most difficult to come to uniformity in this area of law.

This is all different in case of the law of contract. The parties to a contract would not be truly hampered by a change of the law because of their ability to set the rules for their relationship themselves. The law of contract's dynamic character guarantees the elimination and survival of rules that are respectively the least and the most suited for their new environment. Benson (1998, p. 90) quotes Rubin as he says:

If conditions change . . . and two individuals decide that, for their purposes, behaviour that was attractive in the past has ceased to be useful, they can voluntarily devise a new contract stipulating any behaviour that they wish. That is, old custom can be quickly replaced by a new rule of obligation toward certain other individuals without prior consent of or simultaneous recognition by everyone in the group (or of some legal authority).

This evolutionary thesis is backed up by evidence from both economic analysis of law and comparative law.

Economic analysis of law shows the need for a distinction between default and mandatory rules. This type of analysis makes clear that rules should be mandatory when any other rule that the parties would adopt would be violating third parties' interests. Mattei and Cafaggi (1998, p. 348) rightly point out that the amount of mandatory rules should decrease in a system where alternative means of protection of third parties are available. They mention, for example, the lesser amount of mandatory rules in contract law if the tort system protects third parties. It is obvious that property law is much more related to these mandatory rules than contract law. The economic reason for property law being more mandatory runs parallel with the evolutionary idea of property law being less able to change when confronted with a changing environment.

Comparative law also provides us with evidence on the evolutionary thesis. Legal transplants in the field of contract law are far greater than in the field of property law. This may partly be due to private international law's *lex rei sitae* (accordingly there is no need to incorporate foreign property rights into one's own legal system), but it is certainly also due to the high costs of transplanting from another system in the case of property law and the much lesser costs in the case of contract and tort law. In the latter, legal transplants have been vigorous; the relative uniformity that already exists in the field of European contract law is undoubtedly caused by these transplants. In particular English law was to a great extent influenced by the civil law of the nineteenth century (see Reimann, 1993), as continental European law is influenced in the late twentieth century by the law of financial transactions on, for example, swaps, lease and franchising, coming from the common law world. I will elaborate the comparative law evidence for an evolution of law that is more or less easy by looking at legal transplants.

2.5.4 Legal Transplants and the Desire of Legal Rules to Reproduce

To look at the amount of legal transplants from one system to another is fruitful in order to discover which areas of private law are more or less touched by the evolutionary process. The mere fact that a rule is transplanted is already informative as to the low costs of introducing that rule into another legal system. If that same rule would also have the same effect as it has in the 'mother country', the rule would be even neutral to considerations of national morality. Not much systematic research has yet been done to find out to what extent there are differences between the various areas of law being influenced by legal transplants. A preliminary investigation that I undertook in the traditional mixed legal systems clearly shows, however, that the amount of legal transplants has been far greater in the field of contract law and tort law than it has been in the field of property law.

Contract law in South Africa, for example, seems to a high extent to be a true mix of civil law and common law elements. It has, for example, rejected the requirement of consideration but has developed a system of contractual remedies that is to a large extent comparable to English law. In the field of tort law, it has also mixed in a fruitful way the general civil law approach with the protection of specific interests in English law. Any true influence of English property law on the Roman-Dutch system is, however, absent: South African private law has kept its system of a *numerus clausus*. In Scottish law, the same tendency can be identified (compare Smits, 1999, p. 189).

Putting this into evolutionary terms: legal rules have a desire to reproduce themselves in other countries, but in doing so adjust themselves most of the time to the new environment. This gives them the best chance of surviving. If this new (socioeconomic) environment is comparable to that of the mother country, the rule can be expected to remain more or less identical to the one operating in that country. It follows from this behaviour of rules that legal transplants only lead to uniformity in countries that have a comparable socioeconomic constellation. Thus, in the case of the European Union, the rules that are directly related to the coming into being of a common market can be expected to remain the most uniform.

2.5.5 The Race to the Bottom Argument and Evolutionary Theory

Finally, I will investigate whether evolutionary theory gives us some insight into the famous problem of the ‘race to the bottom’, particularly of interest in company law. The idea of competition of legal systems,²⁹ instead of a centralistic harmonization by the state, has the consequence that companies are free to move from one state (or country) to another. In doing so, they will choose the state (or country) with the lowest standards (in the case of American company law that would be the state of Delaware). The ‘home country control principle’ subsequently guarantees that this low standard is exported to other states as well. What will evolve in the end is a uniform law of the lowest standard. The race to the bottom (or ‘social dumping’) may thus be said to arise when, ‘in a deregulated internal market, a state unilaterally lowers its social standards in an attempt to attract business from other states’.³⁰

The present debate on the race-to-the-bottom argument is mostly normative: usually, concerns are expressed about the lowering of standards through jurisdictional competition. The enactment of mandatory social legislation by the European Union even has as an explicit goal to avoid social dumping (Barnard, 2000, p. 66). This chapter addresses the problem from a somewhat different angle: evolutionary theory may be able to show us to what extent a race to the bottom is *inevitable* in a changing economic environment.

As we saw in biology (Section 2.4), the direction of adaptation of a species

is toward simplicity in case of homogenization of the environment and toward complexity when the environment still has many unfilled niches. If this were true for the evolution of private law as well, it would mean that homogenization of the economic environment (that indeed originates within the European Union) leads to simple rules. This seems to confirm that the 'race' is indeed to some common *legal* denominator. Barnard (2000, p. 70) shows, however, that there is little evidence so far of this phenomenon in Europe. She identifies six conditions that need to be met for a race to the bottom to emerge. Among these conditions are a wide choice of different jurisdictions (like more than 50 legal systems in the United States) and full knowledge of each jurisdiction's characteristics. These requirements are not being met in Europe, where there are only 15 jurisdictions with often not so great differences and sometimes great difficulties in obtaining the necessary information about the respective legal systems.

From the evolutionary perspective, a race to the bottom is, however, likely to emerge if these two requirements will be met in the future. As to the first requirement, the enlargement of the European Union with Eastern European states would imply that the differences between the various systems could very well increase. A migration of companies toward systems with lesser standards than the present member-states is then likely to occur. In order to meet the condition of full knowledge of all the European jurisdictions, there is a need for more comparative law study. The only barrier for a true race to the bottom would be constituted by the minimum standards of law, set by the European Union's Directives and Regulations. However, the fact that these standards would be a barrier to evolution can also be explained from evolutionary theory: the path that has been traced out in the past, has – in Europe – been one of not only giving economic considerations the upper hand. A social policy has always been part of the whole European venture. In this sense, the investments already made in this policy would be too costly (maybe even not only in a social or cultural sense, but also in a financial sense in that it would entail large costs of changing the present legal position of workers, unemployed, and so on) to deviate from.

That not all of the present social guarantees in the European legal systems (namely those that guarantee *more* than the European minimum standards) will be kept intact is, however, inevitable. Hayek is right when he stresses that legal rules may have come into being through historical accident, but that natural selection decides which rules are to survive. The natural selection process then chooses between competing groups of humans, letting those groups survive whose cultural norms and rules are more suited to efficiently coordinate social interactions.³¹ The European venture of creating a common market then necessarily implies that it is the group of those who are best able to operate on that market whose rules will eventually survive. Worries about

some ‘mentality’ being strangled in this process are then not relevant anymore: that would be the irreversible consequence of an internal market coming about.

2.6 CLOSING REMARKS

To predict to what extent the different areas of private law will evolve toward some uniform system is not an easy job. If anything should have become clear from this chapter it is that whatever way one wants to travel, a strictly legal perspective does not suffice. In this chapter, I tried to develop an evolutionary perspective on unification, taking from evolutionary biology and economics whatever I found useful to adopt. I do not contend that evolutionary theory is the only framework that provides us with explanatory predictions on how a European private law will develop, but it does provide us with some fruitful insights on the way legal rules adapt themselves to changing circumstances, on path dependence, on legal transplants and on the probability of a race to the bottom. That not all areas of private law appear to be touched to the same extent by the unification process is insightful for what public policy should be in this field. To adopt some European Directive or Regulation in the field of property law appears, for example, to be much too costly because of the strong path dependence in this area of law.

What is perhaps the most important outcome of evolutionary theory applied to the law is that the coming into being of a uniform law for Europe will to a large extent be the result of the emergence of a *spontaneous order* that has not so much to do with a deliberate enactment of law by some sovereign, but much more with a ‘cultural evolution’. As Hayek puts it: culture is not rationally designed, but a tradition of ‘rules of conduct’ that are passed on through cultural transmission in a process that is not consciously planned. A system of rules should primarily be looked at as a spontaneous order that emerges in response to its environment. In this sense, the whole venture of creating a common European market automatically invokes a new, partly unintended, legal system.

NOTES

1. For an elaboration of this programmatic manifesto see Smits (2000). A recent overview of the European Private Law debate is given by Schmid (1999, p. 673).
2. The now most well known set of principles is the Principles of European Contract Law (Lando and Beale, 2000). Compare Hayton, Kortmann and Verhagen (1999).
3. See for an extensive survey of these other initiatives Smits (1999, p. 51).
4. An elaboration of this framework can be found in Smits (1999, p. 19 and 1998, p. 328).
5. For the most outspoken defence of this thesis see Legrand (1999).

6. As has been investigated by Clark (1977, p. 90, and 1981, p. 1238).
7. On common core projects such as the Trento Project see Bussani and Mattei (1997–1998, p. 339).
8. Although Legrand has some illustrious predecessors. I refer to F.C. von Savigny's idea of the *Volksgeist* and of civil law as characteristic for the people of a country (von Savigny [1814] 1967 and to Lord Cooper of Culross, cited in Watson (1974, p. 22): 'law is the reflection of the spirit of a people, and so long as the Scots are conscious that they are a people, they must preserve their law'.
9. Compare Elliot (1985, p. 43): 'by modern standards Savigny's work seems hopelessly metaphorical and unscientific'.
10. Sumner Maine (1861). What Maine does do, however, is predict as the dominant evolutionary trend the change from family responsibility to individual obligation.
11. For an excellent overview see Elliott (1985, p. 38). Compare Stein (1980).
12. See, however, the writings of Clark and Roe, cited hereafter.
13. Watson (1974, p. 7). Compare Watson (1977, 1978, p. 313) and Sacco (1991, p. 1).
14. Watson (1974, p. 13, and 1985). Compare, however, the general reflections (Watson, 1974, p. 95), stemming from his survey of evidence.
15. Watson (1974, p. 98): 'no area of private law can be designated as being extremely resistant to change as a result of foreign influence'. He mentions the import of Swiss family law into the Turkish Civil Code of 1926.
16. On evolutionary biology see Sober (1993), Maynard Smith (1993) and Futuyma (1998).
17. On the influence of Herbert Spencer see Hodgson (1993, p. 81).
18. On sociobiology and the claims it makes about explaining morality see Sober (1993, p. 202); see notably the groundwork laid by Wilson (1975) and Alexander (1987).
19. For an overview see Maynard Smith and Szathmari (1999), Maynard Smith (1982) and Beckstrom (1993).
20. The extensive literature on evolutionary economics includes Hodgson (1993, 1999) and Witt (1993). On the relationship with biology see Foster (1994, p. 23) and Nelson and Winter (1982).
21. Compare the Coase theorem that leads to the conclusion that regardless what the initial assignment of property rights was, there is a trend toward the efficient use of resources. If there are no transaction costs, the outcome of the mutually advantageous exchanges will be efficient.
22. See Vromen (1997, p. 45) on this discussion.
23. Becker (1962, p. 1); compare Vromen (1997, p. 46), who mentions more literature. Hodgson (1999, p. 177): 'the assumption of maximizing behaviour by individual firms is not necessary for the scientific purposes of prediction'.
24. For an overview see the excellent survey by Elliot (1985, p. 62).
25. Roe (1996, p. 667). It does, however, in Comparative Law and Economics; see Mattei and Cafaggi (1998, p. 346).
26. I leave aside the view of Epstein (1980, p. 665), who defends the sociobiological thesis that those who follow rules of conduct have a better chance of surviving than others who do not. Epstein does not see this mechanism operate in each category of law. He regards four categories having evolutionary roots: (a) prohibition of using force against strangers in the same species; (b) first possession of an unowned thing as the root of title; (c) obligations of parents to their children; (d) promissory obligations.
27. Roe (1996, p. 648) distinguishes between semi-strong path dependence (leading to inefficient paths that were once satisfactory but are now worth changing; they are left intact because of the inefficiency to change these). In case of strong-form path dependence, the situation is now inefficient, it would be efficient to change it, and yet we do not do that. Political pressure groups or a lack of information about 'the other way' prevents any change.
28. See Dreher (1999, p. 109): 'Da Wissen und Kosten eng miteinander verbunden sind, stellt Unwissenheit zumindest vor Informationskosten und begrenzt so auch die Faktormobilität ganz entscheidend.'
29. Literature mentioned in Reich (1992, p. 861), Kraus (1997, p. 377), Dreher (1999, p. 105) and Barnard (2000, pp. 57–78).

30. Barnard (2000, p. 57). This 'jurisdictional competition' should be well distinguished from the idea of *free movement of legal rules* (compare smits 1998, p. 328). The former is concerned with choosing some legal *system*, the latter with choosing some legal *rule*.
31. Hayek (1979); 1967, p. 66); compare Introduction, in Witt (1993, p. xxii) and the critical assessment by Vanbereg (1993), p. 482).

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